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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-929

* * *

W. J. ESTELLE, JR., RALPH GRAY AND H. H. HUSBANDS,

Petitioners

V.

J. W. GAMBLE,

Respondent

* * *

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

* * *

BRIEF FOR PETITIONERS

* * *

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SUBJECT INDEX

Page

OPINION BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 7

ARGUMENT AND AUTHORITIES 8

I. The Decision Below, By Raising A Disagreement With Licensed Physicians As To Diagnosis And Treatment To A Constitutional Plane, Conflicts With The Decisions Of Eight Other Courts Of Appeals 8

A. Eight courts of appeals have held that a disagreement with licensed physicians as to diagnosis and treatment does not raise a constitutional question or state a claim under 42 U.S.C. § 1983 9

B. The Respondent's complaint and the decision below consist of a simple disagreement with licensed physicians as to diagnosis and treatment 13

II. The Decision Below Designates The Federal District Courts As Medical Review Boards For Physicians In Correctional Institutions 18

III. The Court Below Impermissibly Drew Significant Inferences From Irrelevant Hearsay Evidence Presented At The Appellate Level 19

CONCLUSION 20

CERTIFICATE OF SERVICE 21

APPENDIX ..... Separately Bound

INDEX OF AUTHORITIES

CASES **Page**

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) 9

Conley v. Gibson, 355 U.S. 41 (1957) 9

Cooper v. Pate, 378 U.S. 564 (1964) 8, 13

Coppinger v. Townsend, 398 F.2d 392 (10th Cir. 1968) 11

Corby v. Conby, 457 F.2d 251 (2nd Cir. 1972) 11

Fitzke v. Shappell, 468 F.2d 1072 (6th Cir. 1972) 12

Freeman v. Lockhart, 503 F.2d 1016 (8th Cir. 1974) 10

Gamble v. Estelle, 516 F.2d 937 (5th Cir. 1975) 1, 14, 15, 17, 19

Gittlemacker v. Prasse, 428 F.2d 1 (3rd Cir. 1970) 12

Haines v. Kerner, 404 U.S. 519 (1972) 8, 13

Page v. Sharpe, 487 F.2d 567 (1st Cir. 1973) 11

Pennsylvania ex rel. Gatewood v. Hendrick, 386 F.2d 179 (3rd Cir. 1966), cert. denied, 386 U.S. 925 (1967) 12

Procunier v. Martinez, 94 S.Ct. 1800, 1807 (1974) 19

Riley v. Rhay, 407 F.2d 496 (9th Cir. 1969) 10

Ruiz v. Estelle, Civil Action No. TY-5523 (E.D. Tex., filed Aug. 17, 1972) 19

Stiltner v. Rhay, 371 F.2d 420 (9th Cir.), cert. denied, 387U.S. 922 (1967) 10

Thomas v. Pate, 493 F.2d 151 (7th Cir. 1974) 12

United States ex rel. Hyde v. McGinnis, 429 F.2d 864 (2nd Cir. 1970) 11

United States ex rel. Johnson v. Prasse, 450 F.2d 946 (3rd Cir. 1971) 12

STATUTES **Page**

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 3

42 U.S.C. § 1983 ..... passim

CONSTITUTION

U.S. CONST. amend. VIII 9

U.S. CONST. amend. XIV 9

BOOKS

FINNESON, LOW BACK PAIN (1973) 15, 17

FRIEDMANN & GALTON, FREEDOM FROM BACKACHES (1973) 16, 17

HURST & LOGUE, THE HEART (2nd ed. 1970) 17

KRAUS, CLINICAL TREATMENT OF BACK AND NECK PAIN (1970) 14, 16, 17

LITTMAN, TEXTBOOK OF ELECTROCARDIOGRAPHY (1972) 17

WHITE, HEART DISEASE (1951) 17

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BRIEF FOR PETITIONERS

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OPINION BELOW

The opinion of the Court of Appeals, *Gamble v. Estelle*, 516 F.2d 937 (5th Cir. 1975), appears in the Appendix at 24-32. The order and judgment entered by the District Court for the Southern District of Texas, Houston Division, dismissing Respondent's complaint for failure to state a claim upon which relief could be granted, appear in the Appendix at 16-21. The order of that District Court denying Respondent permission to appeal under 28 U.S.C. § 1915 due to want of merit and good faith appears in the Appendix at 22-23.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 4, 1975. A timely petition for rehearing and suggested rehearing en banc was denied on October 2, 1975. Apendix at 33. The petition for writ of certiorari was was filed on December 31, 1975, and granted on February 23, 1976. The Honorable Michael Rodak, Jr., Clerk of this Court, extended the time within which to file the Brief for Petitioners until April 28, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTIONS PRESENTED

1. Whether an inmate's *pro se* complaint which states that his injury has been diagnosed and treated by two licensed physicians raises a constitutional question or states a claim under 42 U.S.C. § 1983 upon which relief can be granted.

2. Whether the court of appeals erred in reversing the district court's summary dismissal of a complaint where both the judgment of the court of appeals and the complaint of the inmate rest upon a disagreement with

licensed physicians as to diagnosis and treatment of the inmate's injury.

3. Whether the court of appeals erred in drawing inferences from irrelevant hearsay evidence presented at the appellate level by means of an appendix to complainant's brief.

STATEMENT OF THE CASE

Respondent, an inmate in the Texas Department of Corrections (T.D.C.), filed the *pro se* complaint contained in the Appendix at 3-15 (A.3-15) under 42 U.S.C. § 1983 against Petitioners W. J. Estelle, Jr., Director of T.D.C., Ralph Gray, Medical Director of T.D.C. and chief medical officer of the prison hospital, and H. H. Husbands, Warden of the Walls Unit.

The United States District Court for the Southern District of Texas, Houston Division, summarily dismissed the complaint for failure to state a claim upon which relief could be granted. (A.16-21).

Subsequently, the District Court denied Respondent's motion to vacate judgment and further denied him permission to appeal under 28 U.S.C. § 1915 due to want of merit and good faith. (A.22-23).

The United States Court of Appeals for the Fifth Circuit granted Respondent's application for leave to appeal in forma pauperis and appointed Mr. Daniel K. Hedges of Fulbright & Jaworski, Houston, Texas, to represent him on appeal. That Court had jurisdiction under 28 U.S.C. § 1291. After the submission of briefs and oral argument, the Court of Appeals reversed and remanded the cause with instructions to re-instate the complaint, appoint counsel and permit appropriate amendment. *Gamble v. Estelle*, 516 F.2d 937 (5th Cir. 1975); (A.24-32).

Petitioners' timely application for rehearing and suggested rehearing *en banc* was denied on October 2, 1975. (A.33).

Since the decisions of the courts below, and the decision of this Court depend entirely upon the *facts* alleged by Respondent in his complaint, Petitioners find it necessary to set them out.

On *November 9, 1973*, Respondent, while unloading cotton bales from a truck and flipping them to a machine, sustained an injury to his lower back. A "6.00" (?) pound bale, which Respondent was flipping, started falling flat and fell on him while he was attempting to prevent it from falling. (A.4).

Respondent worked four more hours, at which time he became stiff and requested a pass to the hospital. There, he was checked by a medical assistant (Captin Blunt) for a hernia and was sent to his living quarters. Two hours later, Respondent returned to the hospital, was given two pain pills by an inmate nurse, and saw a *doctor*. (A.4).

The next day, *November 10, 1973*, Respondent was examined by *Dr. Astone* at the hospital who diagnosed his injury as a lower back sprain. *Dr. Astone* placed Respondent on cellpass-cellfeed for two days, which meant he could remain in his cell, and prescribed Zactirin and Robaxin. (A.5).

On *November 12, 1973*, Respondent again saw *Dr. Astone* at the hospital who continued the same medication and extended the cellpass-cellfeed. (A.5).

On *November 19, 1973*, Respondent again saw *Dr. Astone* who prescribed Robaxin and Febridyne for seven days and extended the cellpass-cellfeed. (A.5).

On *November 26, 1973*, Respondent again saw *Dr.*

Astone who prescribed Zactirin for five days and extended the cellpass-cellfeed for seven days. (A.5).

On *December 3, 1973*, Respondent again saw *Dr. Astone* who prescribed Febridyne for seven days but took him off the cellpass-cellfeed, which meant that he would do light work. The same day, Respondent went to Major Muddox's office and told him he was not going to work because of lower back pain, and Respondent was placed in administrative segregation. (A.6).

On *December 5, 1973*, Respondent was taken before the unit disciplinary committee. He told the committee that he was still hurting, that he had only been given pain pills, and that *Dr. Astone* had not even noticed his high blood pressure. The committee took no action against Respondent and sent him to see another *doctor*. (A.6).

The next day, *December 6, 1973*, Respondent saw *Dr. Gray*, the TDC Medical Director and chief medical officer of the prison hospital, at the hospital who administered urinalysis, blood analysis, and high blood pressure tests. *Dr. Gray's* diagnosis of his back injury was that he had incurred a lower back sprain. Respondent's blood pressure was found to be 168/112. *Dr. Gray* prescribed Serapes and Febridyne. (A.6-7).

On *December 13, 1973*, Respondent saw *Dr. Gray* for back pain and high blood pressure. The blood pressure reading was found to be 152/98 and *Dr. Gray* prescribed Serapes for thirty days. (A.7).

On *December 17, 1973*, Respondent saw medical assistant Blunt at the hospital for back pain and received a prescription of Tiognolos for seven days. (A.7).

On *December 27, 1973*, Respondent again saw medical assistant Blunt who continued the Tiognolos

prescription for seven days.

On *January 3, 1974*, Captain Linsley asked Respondent if he wanted to go to work. He replied that he was not going to work hurting, and Captain Linsley stated that he would send him to the farm. (A.8).

On *January 5, 1974*, Lieutenant Ramsey asked the same question, received the same reply, and made the same statement. (A.8).

On *January 7, 1974*, Respondent went to the hospital for lower back pain, high blood pressure, and migraine headaches. Medical assistant Blunt prescribed Sodium Solicylate for seven days and Serapes for thirty days. (A.8).

On *January 17, 1974*, Respondent went to the hospital for lower back pain and stomach pain. Medical assistant Blunt prescribed Sodium Solicylate for seven days. (A.9).

On *January 25, 1974*, Respondent went to the hospital for lower back pain. Medical assistant Blunt prescribed Sodium Solicylate for thirty days. (A.9).

On *January 31, 1974*, Respondent was brought before the unit disciplinary committee pursuant to his refusal to go to work on *January 5*. He told the committee that he was not going to work with his lower back pain and high blood pressure. Medical assistant Blunt told the committee that Respondent's health classification was first class. The committee's ruling was adverse to Respondent, and he was placed in solitary confinement for refusing to work. (A. 9-10).

On *February 4, 1974*, Respondent complained of chest pain and black outs in the morning and was admitted to the hospital that evening. (A.10).

On *February 5, 1974*, *Dr. Heaton* interpreted an electrocardiagram administered to Respondent as follows: multiple unifocal P.V.C., S (re-entry often), inverted T wave, A.V.R. - lead 3 (normal), elevated P wave. (A.10).

On *February 6, 1974*, Respondent was transferred to administrative segregation and was placed on Quinidine pills by *Dr. Heaton* for three days. (A.10). Respondent was still having chest pain when he was discharged from the hospital.

On *February 8, 1974*, Respondent asked Officer Spencer to go on sick call for lower back pain, chest pain and black outs when he stood up. Officer Spencer went to check and on his return told Respondent they did not want him to go on sick call. (A.11).

On *February 9, 1974*, Respondent again complained of chest pain and saw *Dr. Heaton* at the hospital who continued the Quinidine prescription for another three days.

On *February 11, 1974*, Respondent signed the complaint, alleging the foregoing facts. (A.15).

SUMMARY OF ARGUMENT

The Respondent inmate filed a complaint under 42 U.S.C. § 1983 alleging that he had seen at least two doctors on eight separate occasions for a back injury. Both doctors had diagnosed the injury as a lower back sprain and had prescribed bed rest (cellpass-cellfeed), analgesics and/or muscle relaxants. The district court dismissed the complaint for failure to state a claim upon which relief could be granted. The United States Court of Appeals for the Fifth Circuit reversed and remanded the case with instructions to re-instate the complaint

and appoint counsel.

Though various catch-phrases have been employed by the courts to demark the point at which judicial deference to prison officials on matters of medical treatment must accede, the present case clearly falls outside the scope of the area in which judicial inquiry is constitutionally permissible. When the Respondent's *pro se* complaint is read with great liberality as to form, *Haines v. Kerner*, 404 U.S. 519, 520 (1972), and with special scrutiny as to the *facts* alleged, assuming them to be true, *Cooper v. Pate*, 378 U.S. 564 (1964), it is clear that Respondent's entire complaint rests on a difference of opinion with his physicians as to the diagnosis and treatment of his back injury. Of more alarming significance is that the opinion of the United States Court of Appeals for the Fifth Circuit is premised upon a similar difference of opinion between the honorable judges and the physicians, resulting in federal constitutional intervention. Eight other Courts of Appeals have held that such a disagreement does not raise a constitutional question or state a claim under 42 U.S.C. § 1983. To hold otherwise is to designate the federal district courts as medical review boards for physicians in correctional institutions.

A subsidiary point raised by Petitioners concerns the court below's reliance on a report dealing with the general delivery of medical services in the Texas prison system. Not only was the question of the adequacy of medical services in general neither presented to nor litigated in the district court, that question is totally irrelevant to the issue of whether the treatment afforded Respondent presented a reviewable constitutional claim.

ARGUMENT AND AUTHORITIES

I. The Decision Below, By Raising A Disagreement With Licensed Physicians As To Diagnosis And Treatment To A Constitutional Plane, Conflicts With The Decisions Of Eight Other Courts Of Appeals.

A. Eight courts of appeals have held that a disagreement with licensed physicians as to diagnosis and treatment does not raise a constitutional question or state a claim under 42 U.S.C. § 1983.

The leading case setting out the test applied to determine the sufficiency of a complaint is *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957):

> "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

It is fundamental that the primary element necessary to obtain relief under 42 U.S.C. § 1983 is a deprivation of a right secured by the "Constitution and laws" of the United States. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). In the area of medical care afforded inmates, the requisite constitutional infirmity for federal jurisdiction must be based on a transgression of either the eight amendment's prohibition against cruel and unusual punishment or the fourteenth amendment's protection of life. Thus, eight courts of appeals have held that a complaint alleging a *refusal* to provide medical care states a claim under § 1983, but that a claimed *inadequacy* of treatment does not, absent *exceptional* circumstances.

The United States Court of Appeals for the Ninth Circuit has followed the general rule that prison medical officials have broad discretionary authority in treating inmates. However, a complaint alleging a *failure or refusal* to provide medical care states a claim upon which relief can be granted and should not be dismissed. *Riley v. Rhay*, 407 F.2d 496 (9th Cir. 1969). To the contrary, a complaint alleging *inadequate* medical treatment should be dismissed unless *exceptional circumstances* exist which warrant judicial inquiry. See *Stiltner v. Rhay*, 371 F.2d 420 (9th Cir.), cert. denied, 387 U.S. 922 (1967). Where an inmate's allegations show only that he has not been receiving the kind and quality of medical treatment he believes is indicated, the complaint fails to state a claim upon which relief can be granted. *Id.* at 421 n.3.

The United States Court of Appeals for the Eighth Circuit also takes the position that a complaint alleging a *refusal* to provide medical treatment states a claim, but that a *claimed inadequacy* of treatment does not, absent exceptional circumstances. In *Freeman v. Lockhart*, 503 F.2d 1016 (8th Cir. 1974), the inmate alleged that the prison optometrist had suggested that surgery might correct the tuberculosis which had settled in his eyes and constituted a hazard to his vision; that he was subsequently denied access to a physician; and that consequently his vision was permanently impaired. The court found that the alleged refusal to provide treatment stated a claim upon which relief could be granted, but noted that:

> *"allegations of mere negligency in the treatment of a prisoner's condition or claims based on a difference of opinion over matters of medical judgment fail to state a federal constitutional question.* . . . [T]he claimed inadequacy of treatment must be predicated on *obvious neglect* or *intentional misconduct* by the prison officials (citations omitted), and must be so *heinous* as to constitute cruel and unusual punishment as that term is used in the Eighth Amendment or so endanger the prisoner's physical well-being that his Fourteenth Amendment right to life is violated." *Id.* at 1017. (Emphasis supplied).

The United States Court of Appeals for the First Circuit has used a "conduct which shocks the conscience" test when inadequacy in treatment is alleged rather than the "obvious neglect-intentional misconduct-heinous inadequacy" standard used by the Eighth Circuit. *Page v. Sharpe*, 487 F.2d 567 (1st Cir. 1973).

The United States Court of Appeals for the Second Circuit draws the same distinction between an alleged total denial of medical treatment and an alleged inadequacy of treatment -- the former states a claim while the latter does not. *E.g., Corby v. Conby*, 457 F.2d 251 (2d Cir. 1972); *United States ex rel. Hyde v. McGinnis*, 429 F.2d 864 (2d Cir. 1970).

In *Coppinger v. Townsend*, 398 F.2d 392 (10th Cir. 1968), the United States Court of Appeals for the Tenth Circuit stated the distinction between the two claims:

> "A claim of total denial of medical care differs from a claim of inadequacy of medical care . . . . [I]n the instant case the allegations of the complaint show that medical care has been furnished. . . . The prisoner's right is to medical care-not to the type or scope of medical care which he personally desires. *A*

difference of opinion between a physician and a patient does not give rise to a constitutional right or sustain a claim under § 1983." Id. at 394.

The United States Court of Appeals for the Seventh Circuit has recently stated the inadequate medical treatment rule and its rationale as follows:

> "[A] claim is not stated where (an inmate) alleges no more than that he is dissatisfied as to the adequacy of treatment actually received for a particular injury or ailment. (Citations omitted). *Courts will not attempt to second-guess licensed physicians as to the propriety of a particular course of medical treatment for a given prisoner-patient." Thomas v. Pate*, 493 F.2d 151 (7th Cir. 1974).

The United States Court of Appeals for the Sixth Circuit has followed the established pattern in *Fitzke v. Shappell*, 468 F.2d 1072 (6th Cir. 1972) by holding that a complaint alleging a refusal to provide medical treatment states a claim and distinguishing the case where a prisoner is not "complaining about the refusal to provide medical care, but rather about the inadequacy of medical care . . . provided." *Id.* at 1076 n.4.

The United States Court of Appeals for the Third Circuit also takes the position that a complaint alleging improper or negligent medical treatment does not state a claim upon which relief can be granted. *United States ex rel. Johnson v. Prasse*, 450 F.2d 946 (3d Cir. 1971); *Gittlemacker v. Prasse*, 428 F.2d 1 (3rd Cir. 1970); *Pennsylvania ex rel. Gatewood v. Hendrick*, 368 F.2d 179 (3rd Cir. 1966), cert.denied, 386 U.S. 925 (1967).

Thus, eight courts of appeals have held that a complaint alleging a refusal to provide medical care states a claim under § 1983, but that a claimed inadequacy of treatment does not, absent exceptional circumstances. A disagreement with licensed

physicians as to diagnosis and treatment fails to state a federal constitutional question.[1]

B. The Respondent's complaint and the decision below consist of a simple disagreement with licensed physicians as to diagnosis and treatment.

Though various catch-phrases have been employed by the courts to demark the point at which judicial deference to prison officials on matters of medical treatment must accede, the present case clearly falls outside the scope of the area in which judicial inquiry is warranted.[2] When the Respondent's *pro se* complaint is read with great liberality as to form, *Haines v. Kerner*, 404 U.S. 519, 520 (1972), and with special scrutiny as to the *facts* alleged, assuming them to be true, *Cooper v. Pate*, 378 U.S. 564 (1964), it is clear that Respondent's

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[1]This Court's decision in *Haines v. Kerner*, 404 U.S. 519 (1972) has not detracted from the principles established by the foregoing cases, which were decided both before and after it was rendered. The complaint in *Haines* alleged that the prisoner suffered an aggravation of an existing foot injury and a circulatory ailment by being forced to sleep on blankets on the floor of his solitary confinement cell. The complaint contained no recital of any attempt to treat the inmate's injuries. Also alleged was a denial of due process in steps leading to his confinement in solitary. Noting the liberality with which *pro se* complaints are read, this Court held that a claim had been stated. This holding is consistent with the prevailing rule delineated above that a complaint alleging a total failure to provide medical treatment states a claim upon which relief can be granted.

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[2]At the outset, it must be realized that Respondent is not challenging the treatment administered for his heart and blood pressure. (See Response to Petition for Writ of Certiorari at 4). The only dispute in this case concerns Respondent's back injury and Petitioners will focus their attention on that.

entire complaint rests on a difference of opinion with his physicians as to the diagnosis and treatment of his back injury. Of more alarming significance is that the opinion of the court below is premised upon a similar difference of opinion between the honorable judges and the physicians, resulting in federal constitutional intervention.

This is obviously not a case where the inmate has alleged a *refusal* to provide medical treatment for his back, though the liberality of reading a *pro se* complaint is stretched to its apogee. The Respondent himself stated that he saw Dr. Astone five times (A.5-6), Dr. Gray two times (A.6-7), and medical assistant Blunt six times (A.4,7,8,9). In addition, Respondent saw an unidentified doctor on the very day he was injured. (A.4).

Contrary to the assertion of the court below that "the State . . . failed to diagnose Gamble's lower back injury," *Gamble v. Estelle*, 516 F.2d 937, 941 (5th Cir. 1975), both Dr. Astone and Dr. Gray, the T.D.C. Medical Director and chief medical officer of the prison hospital, diagnosed Respondent's back injury as a lower back sprain. (A.5-6).[3]

At most, the Respondent's complaint alleges that the medical treatment received for the back injury was *inadequate*. However, Respondent argued before the court below that the treatment afforded was in reality no treatment at all in an attempt to fall within the rule that a complaint alleging a total failure to provide medical treatment states a claim upon which relief can be granted. (Appellant's Fifth Circuit Brief at 7, 11-12). Indeed, that court adopted Respondent's assertion by

[3]Dr. Gray did so after administering urinalysis and blood analysis tests, which are useful in eliminating the possibility that the back pain was caused by a systemic (organic) disease. KRAUS, CLINICAL TREATMENT OF BACK AND NECK PAIN 29 (1970).

stating that "the only medication prescribed was to relieve the pain, not to cure the injury." *Gamble v. Estelle, supra* at 941. Respondent's argument and the court's conclusion rest entirely on a difference of opinion with the doctors as to the propriety of the course of medical treatment undertaken. The doctors variously prescribed bed rest (cellpass-cellfeed), analgesics and/or muscle relaxants for the back sprain. Contrary to the assertions of the nonphysicians, each of these plays a definite role in the *treatment* of lower back dysfunction. FINNESON, LOW BACK PAIN 95, 108, 111 (1973).

Attempting to fall within the rule that a complaint challenging the adequacy of treatment provided should not be dismissed if "exceptional circumstances" exist, Respondent argued below that the persistence of the pain indicated that his injury was a potentially serious lower back sprain. (Appellant's Fifth Circuit Brief at 11-12). Notwithstanding the inescapable conclusion that this argument is nothing more than an attempt to second-guess the diagnosis of licensed physicians, the court below reached a similar medical judgment:

> "[T]he exact nature of the back injury remains unknown. Certainly the pain pills had no curative effect, even though they were administered for some 3 months." *Gamble v. Estelle, supra* at 941.

Contrary to Respondent's argument and the court's conclusion, the persistence of the pain was not an indication that the Respondent's injury was not a simple muscle sprain for "[t]here is no relationship *whatsoever* between the severity of the injury and the *intensity* or *duration* of the symptoms. FINNESON, LOW BACK PAIN, *supra* at 90 (emphasis supplied). Moreover, the continuing pain could well have been caused by Respondent's refusal to discontinue his prolonged

bedrest as ordered by Dr. Astone.[4] FRIEDMANN & GALTON, FREEDOM FROM BACKACHES 100 (1973); KRAUS, CLINICAL TREATMENT OF BACK AND NECK PAIN, *supra* at 24. Finally, every medical book consulted emphasizes that pain, in varying degrees, has both an organic and a psychological cause, though the patient may not even be cognizant of the latter. The *unconscious* prolongation of symptoms in the face of secondary gain (such as the ability to refrain from working) is a fact acknowledged by all physicians. Pain is "an almost entirely subjective phenomenon. It is especially difficult to differentiate organic factors from psychic. . . . It is in this area that the 'art' of the physician is most severely challenged and is almost impossible to subject to quantitative evaluation and

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[4]Though the treatment of Respondent's physical problems other than his back injury is not at issue in this appeal, these problems are a sad commentary on the circumstances of this case. Respondent was placed on cellpass-cellfeed for 24 days after he injured his back. Presumably, he spent much of that time lying on his bed since there is little else to do in a prison cell. Dr. Astone's refusal to continue the cellpass-cellfeed meant the Respondent would do light work. Respondent refused to do so because of the continuing back pain and remained in his cell. This may have been logical to a layperson but not to a doctor:

> "For patients engaged in physical labor, the time to *resumework is not when they no longer experience pain, nor when they have normal muscle tests. Such patients require a slow and gradual retraining period to regain their lost lifting, carrying and pulling abilities."* KRAUS, *supra* at 122. (Emphasis in original).

As noted above, weakness of posture muscles due to prolonged bedrest may be the cause of continuing back pain. *Id.* at 24;FRIEDMANN & GALTON, *supra* at 100. Subsequently, Respondent complained of high blood pressure, chest pain, migraine headaches, stomach pain and black outs when he stood up. His blood pressure was indeed above normal and an electrocardiogram showed an inverted T wave and an elevated P

criticism. FINNESON, *supra* at 84.[5]

The court below further suggested that x-rays and other tests should have been conducted " that would other tests should have been conducted "that would have led to *appropriate* diagnosis and treatment." *Gamble v. Estelle*, *supra* at 941 (emphasis supplied). First, a comprehensive examination of low back pain consists of a series of simple physical movements and should take no more than fifteen minutes. FINNESON, *supra* at 41-48. Second, Petitioners could discuss the relative attributes in terms of utility, risks etc. of various tests including x-rays, electromyograms, myelographies,

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Footnote 4 cont.

wave. It is unfortunate that Respondent may have been the direct cause of his own problems by refusing to leave his cell. Prolonged bedrest causes "certain circulatory changes which may give rise to light-headedness and in some cases syncope once the erect position is resumed." FINNESON, *supra* at 96. Moreover, "[i]f the patient is under chronic stress, as most chronic . . . back pain patients are, the effect of the stress may help produce cardiovascular, gastrointestinal, or other diseases." KRAUS, *supra* at 29. That Respondent was under stress is not to be doubted since he alleged that the "wrongs" committed caused him to suffer mental anguish. (A.12). As to the cardiovascular effects of stress, Respondent's inversions of the T waves have generally been found in anxious patients. HURST & LOGUE, THE HEART 1471 (2d ed. 1970), though some normal persons are found to have them. LITTMAN, TEXTBOOK OF ELECTROCARDIOGRAPHY 74 (1972). Moreover, Respondent's elevated P waves may be caused by hypertension. WHITE, HEART DISEASE 209 (1951).

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[5]It is worth noting that in the overwhelming majority of cases, back pain has nothing to do with serious organic problems. FRIEDMAN & GALTON, *supra* at 11. The most important principle in the treatment of low back dysfunction is the avoidance of overtreatment. FINNESON, *supra* at 85-86.

discographies, and analysis of spinal protein fluid, but such a discussion would serve no useful purpose except to further emphasize the Respondent's and the court below's disagreement with the physicians' diagnosis of a lower back sprain.

II. The Decision Below Designates The Federal District Courts As Medical Review Boards For Physicians In Correctional Institutions.

If a complaint which stipulates that the inmate has seen several different doctors on numerous occasions and that these doctors have diagnosed his injury and prescribed treatment does not warrant summary dismissal, no complaint will. If the district court could not dismiss under the facts alleged in the Respondent's complaint, every future treatment may be challenged.

The court below prescribed the appropriate medical course of action to be x-rays and other tests of Respondent. The basis for such a judicial medical prescription can be none other than a simple disagreement with the diagnoses of the doctors. Quite simply, this means that if an inmate were examined by a dozen different doctors, each of whom diagnosed an injury as a lower back sprain, a district court could not dismiss the case for failure to state a claim because the doctors believed x-rays and other further tests to be unnecessary for their diagnoses. In sum, instead of allowing experienced and trained physicians to decide which inmates genuinely need to be x-rayed and tested further, the court below has removed that medical judgment from the hands of the doctors and placed it in the courts.

Thus, if an inmate hereafter complains that the doctors have not cured his ailment, the federal district

courts must intervene and review the physicians' diagnoses and treatment.[6] As a result, "the capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase of frivolous complaints." *Procunier v. Martinez*, 416 U.S. 396, 405 n.9 (1974).

III. The Court Below Impermissibly Drew Significant Inferences From Irrelevant Hearsay Evidence Presented At The Appellate Level.

On the basis of the Report of the Citizens Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature, a portion of which was reproduced in the Appendix to Respondent's brief below, the court below found that, "the general medical services afforded by the State [of Texas] in its prisons are publicly known to be 'woefully inadequate.'" *Gamble v. Estelle, supra* at 940 and n.1.

The issue of the adequacy of general medical services afforded by the T.D.C. is presently being actively litigated in numerous major lawsuits, *e.g., Ruiz v. Estelle*, Civil Action No. TY-5523 (E.D. Tex., filed Aug. 17, 1972). Yet, the court below gave credence to the foregoing Report and its conclusion by drawing therefrom inferences adverse to the Petitioners, even though the question of the adequacy of medical services *in general* was neither presented to nor litigated in the district court. Most significantly, that question is *totally irrelevant* to the issue of whether the treatment afforded *this Respondent* presented a reviewable constitutional

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[6]If this be a constitutional right, the courts should also recognize it for indigents outside of prison who cannot even afford to see two doctors on numerous occasions for a back injury.

claim. When the Respondent saw at least two doctors, including the T.D.C. Medical Director and chief medical officer of the prison hospital, on eight different occasions, it is inconceivable how an alleged general shortage of doctors is relevant to Respondent's case.

CONCLUSION

For all of the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circut should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joe B. Dibrell, Jr., a member of the Bar of the Supreme Court of the United States, do hereby certify that three copies of the foregoing Brief for Petitioners have been served by placing same in the United States Mail, First Class, Certified, and Postage Prepaid, on this the 27th day of April, 1976, addressed to: Mr. Daniel K. Hedges, Attorney for Respondent, 800 Bank of the Southwest Building, Houston, Texas 77002.

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